PRIVY COUNCIL REPORT

NEW INDIA ASSURANCE CO. LTD. v. YEO BENG CHOW

[P.C. (Lord Wilberforce, Viscount Dilhorne, Lord Pearson, Lord Cross of Chelsea, and Lord Salmon) March 28, 1972]

[Privy Council Appeal No. 9 of 1971]

Insurance — Motor insurance — Insurance against third party risks — Condition in policy — Imposition of obligation on insured — Right of insurers to impose conditions — When binding on insured — Whether insurers obliged to relate conditions to particular aspects of policy.

This was an appeal from the decision of the Federal Court ([1970] 2 M.L.J. 223).

On June 8, 1960, the appellant company issued a policy of insurance to the respondent covering him against third party liability in respect of the use of an Austin lorry. The policy issued was one designed for comprehensive insurance but which was adapted to and limited to third party liability.

On January 18, 1961, the lorry was involved in an accident with a motor cycle in which the rider died. At the inquest, evidence was given as to the condition of the lorry, as a result of which, on August 21, 1961, the appellant company gave notice repudiating liability under the policy on the ground that there had been a breach of condition 3 of the policy in that the vehicle had not been maintained in an efficient condition.

It was agreed by counsel that the only issue to be tried was whether there was a breach of condition 3 of the insurance policy.

The Federal Court held that condition 3 was not binding on the respondent 'as a condition which he knew or ought to have known'.

On appeal to the Privy Council,

Held, allowing the appeal: the language of condition 3 was clear and not ambiguous and any reader of it must have known that it imposed an obligation on the insured to take all reasonable steps to maintain the vehicle in an efficient condition.

Semble: Insurance companies can insert such conditions as they choose and if the conditions inserted are accepted by the insured, they are binding upon him. There is no obligation on an insurance company to relate the conditions to particular aspects of the policy.

PRIVY COUNCIL.

Raymond Kidwell Q.C. with *Eugene Cotran* for the appellants.

Respondent absent.

Viscount Dilhorne (delivering the judgment of the Board): The appellant company on 8th June 1960 issued to the respondent a policy of insurance covering him against third party liability in respect of the use of an Austin lorry. The policy issued was one designed for comprehensive insurance. It was adapted to and limited to third party liability by the deletion of section I of the policy, which provided cover against loss or damage, so that the policy ran as follows:

"Now this Policy witnesseth:

That in respect of events occuring during the Period of Insurance and subject to the terms exceptions and conditions contained herein or endorsed hereon (hereinafter collectively referred to as the Terms of this Policy)

SECTION II—LIABILITY TO THIRD PARTIES

1. The Company will.... indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle.... against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of:

(a) death of or bodily injury to any person

(b) damage to property"

The policy contained the following conditions:

"3. The Insured shall take all reasonable steps to safeguard the Motor Vehicle from loss or damage and to maintain the Motor Vehicle in efficient condition and the Company shall have at all times free and full access to examine the Motor Vehicle or any part thereof or any driver or employee of the Insured. In the event of any accident or breakdown the Motor Vehicle shall not be left unattended without proper precautions being taken to prevent further loss or damage and if the Motor Vehicle be driven before the necessary repairs are effected any extension of the damage or any further damage to the Motor Vehicle shall be excluded from the scope of the indemnity granted by this policy.

10. The due observance and fulfilment of the Terms of this Policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy."

On 18th January 1961 there was a collision between the lorry and a motor cycle as a result of which the rider of the motor cycle died. At the inquest evidence was given as to the condition of the lorry and on 21st August 1961 the appellant company gave notice repudiating liability under the policy on the ground that there had been a breach of condition 3 in that the vehicle had not been maintained in an efficient condition.

The respondent's driver was on 29th October 1961 prosecuted for driving without reasonable consideration for other persons using the road and was acquitted

Civil proceedings then ensued and in consequence thereof the appellant company paid $2,709.60 in damages and $1,819.35 in costs. The company also incurred costs in relation to these proceedings amounting to $2,022.10.

The appellant company then claimed these sums totalling $6,551.05 from the respondent.

In paragraph 6 of their statement of claim they alleged that:

"It was a condition in the Policy that the Insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the motor vehicle in efficient condition."

In his defence the respondent admitted this paragraph of the statement of claim so at the trial no question was raised as to the applicability of condition 3. It was agreed by counsel that the only issue to be tried was:

"Whether the defendant was in breach of condition 3 of the policy issued by the plantiff to the defendant."

After hearing evidence for the appellant company from a vehicle examiner that the vehicle was not roadworthy and that "The owner of that lorry had not kept the lorry in an efficient or roadworthy condition" and after seeing the examiner's report on the vehicle which stated:

"(2) the footbrake was in order.

(3) the hand brake was not working.

(4) re the steering, the O/S track rod ball joints worn.

(5) *re* the tyres, both front tyres were bald and both rear tyres 90% (bald).

(6) *re* the other components (1) front and rear spring shackle pins and bushes worn (2) O/S front wheel bearing very slack. (3) vehicle discharges excessive smoke. (4) rear floorboards holed.

(7) damage which appeared to have been caused in an accident was O/S front mudguard panel badly dented.

(8) the general condition of the vehicle discounting the effects of accident damage was Not Roadworthy. Items 3, 4, 5 and 6 above refers."

the trial judge, Sharma J., gave judgment for the amount claimed against the respondent.

The respondent then appealed. In his memorandum of appeal it was alleged that the judge had come to a wrong conclusion on the evidence in holding that the vehicle was not roadworthy. So far as can be judged from the notes taken by the judges of the Federal Court this appears to have been the only matter argued before that court. At some stage it would seem that other questions were raised for a written submission was made to the court by the appellant company on the question, not raised at the trial, whether condition 3 of the policy applied, section I having been deleted.

In that submission no reference was made to whether the appellant company were entitled to recover from the respondent the costs they had paid to their solicitors for defending the third party claim, a matter dealt with by Ong C.J. delivering the judgment of the Federal Court on the appeal.

The appeal was allowed, it being held that condition 3 was not binding on the respondent 'as a condition which he knew or ought to have known'. Ong C.J. posed the question, section I being deleted, could "it still be true to say that condition 3 was wholly unaffected? Could it survive intact the excision of section I?" In his view as liability for loss or damage was not covered by the policy "so much of the condition as required" the respondent "to safeguard the vehicle from loss or damage manifestly could have no application" and he said "So far as the" appellants "are concerned, condition 3 had been mutilated".

Their Lordships are unable to accept these conclusions. It may be that those parts of condition 3 which related to loss and damage were inserted in the policy bearing in mind that it was drafted to provide comprehensive cover but it does not follow from a limitation of the cover that there was any alteration to be implied in the conditions precedent contained in the policy. Insurance companies can insert such conditions as they choose and if the conditions inserted are accepted by the insured, they are binding upon him. There is no obligation on an insurance company to relate the conditions to particular aspects of the policy.

In their Lordships' opinion condition 3 could and did survive the deletion of section I. It was a condition precedent to the liability of the appellant company and the policy was issued subject to it. Its language is clear and not ambiguous and any reader of it must have known that it imposed an obligation on the insured to take all reasonable steps to maintain the vehicle in an efficient condition.

It may be that if the insured had pointed out to the appellant company that, as he was not to be covered against loss or damage, the parts of the condition relating to that were unnecessary, their deletion might have been agreed to but the insured accepted the policy without amendment of the condition and in their Lordships' opinion is bound by it. Even if it had been amended in that way, it is to say the least, unlikely that the appellant company would have agreed to the deletion of the obligation to take all reasonable steps to maintain the vehicle in an efficient condition and it is that part of the condition that is material in this case.

Ong C.J. went on to say, mistakenly as the extract quoted from the examiner's evidence shows, that nothing had been said at the trial about the vehicle not being efficient. He said the word "efficient" in "efficient condition" and "roadworthy" had been treated as synonymous. There was ample evidence at the trial that the lorry was not roadworthy. Motor vehicles are intended for use on the roads. A vehicle in an efficient condition is fit for use on the roads, that is to say, roadworthy, and the converse is equally true. A vehicle which is not roadworthy is not in an efficient condition.

At the conclusion of his judgment Ong C.J. expressed the opinion that even if the appellant company were entitled to succeed, they could not recover from the respondent the costs they had themselves incurred in defending the third party claim.

The policy in a paragraph headed "Avoidance of Certain Terms and Right of Recovery" entitled them to recover from the insured "all sums paid by the company which the company would not have been liable to pay but for the legislation" and it is in consequence of this provision that this action was brought.

The legislation in question is section 80(1) of the Road Traffic Ordinance of Malaysia which requires an insurance company which has issued a certificate of insurance, even though the company may be entitled to avoid or cancel the policy —

"to pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest...."

The costs the appellant company paid to their solicitors were not an amount they were liable to pay by virtue of the legislation and in their Lordships' opinion Ong C.J. was right in holding that they were not recoverable.

Their Lordships have thought it right to deal with the questions of substance raised by Ong C.J. and have not in the circumstances found it necessary to consider or to express any opinion on whether it was open to the Federal Court of Malaysia to decide that condition 3 did not apply when it was admitted in the defence that it did, and to decide the point as to the appellant's costs when that point had not been raised

in the defence or in the memorandum of appeal, or so far as appears, in argument.

For these reasons their Lordships will report their opinion to the Head of Malaysia that the appeal should be allowed and judgment entered for the appellant company not for $6,551.05 but for $4,528.95 and that the respondent should pay the costs of this appeal and in the courts below.

Appeal allowed.

Solicitors: *T. L. Wilson & Co.*

SINGAPORE REPORTS

BANK NEGARA INDONESIA v. PHILIP HOALIM

[C.A. (Tan Ah Tah, Winslow and Choor Singh JJ.)
November 27, 1971]

[Singapore — Civil Appeal No. 18 of 1970]

Landlord and Tenant — Recovery of possession — Whether premises "a new building" — Whether there had been a change of identity — Control of Rent Ordinance (Cap. 242, 1955 Ed.), s. 2.

Landlord and Tenant — Recovery of possession — Notice to quit — Estoppel.

The appellants/plaintiffs brought an action against the respondent/defendant claiming, *inter alia,* possession of the front room on the third floor of premises known as No. 3 Malacca Street. The said front room was let by the appellants to the respondent on a monthly tenancy.

The facts in this case were as follows:

The premises in question in 1957 were owned by one Lee Cheng Kiat. It was then an old three-storeyed building and the defendant was since 1945 a tenant of the front portion of the first floor of the said building and he was carrying on his profession as an advocate and solicitor there. In 1957 the plaintiffs negotiated to purchase the said building. In June, 1958, alterations and additions to the said building were commenced. During the alterations and additions all the tenants in the said building moved out except the defendant. A new third floor was added and when that was completed the defendant moved to the front portion of the third floor paying the same rent of $147.40 per month. The alterations and additions were completed at the end of 1958. In July, 1959, the property was conveyed to the plaintiffs by Lee Cheng Kiat. On March 29, 1961, the plaintiffs granted the defendant a lease for a term of three years from March 1, 1961, at a monthly rent of $280 per month. After the expiry of the lease in 1964 the defendant stayed on and the plaintiffs accepted the rent. On January 13, 1969, the plaintiffs gave the defendant a notice to quit expiring on February 28, 1969. The defendant failed to vacate and the plaintiffs commenced the present proceedings in March, 1969.

In his evidence the defendant said *inter alia* that the then solicitors for the plaintiffs had told him that he would have the same protection under the Control of Rent Ordinance when he moved to the third floor as he had on the front portion of the first floor and that the plaintiffs would not ask him to leave the premises for so long as he was practising his profession.

There were two issues before the court below: (1) whether the said building was "a new building" within the meaning of the Control of Rent Ordinance; and (2) whether, if the said building was held to be a new building, the plaintiffs were estopped from giving the defendant a notice to quit the premises.

The learned trial judge found that the said building was a new building within the meaning of the Control of Rent Ordinance, but dismissed the plaintiffs' claim on the ground that the plaintiffs were estopped from giving the defendant a notice to quit for so long as the defendant carried on his profession as an advocate and solicitor on the premises which had been let to him.

The plaintiffs appealed against that part of the judgment which held that they were estopped from giving the defendant a notice to quit. The defendant filed a cross-appeal against that part of the judgment in which it was held that the said building is a new building.

Held, dismissing the appeal and allowing the cross-appeal: (1) on the evidence as a whole, the said building had not changed its identity in such a manner as to be described as a new building. Therefore, the said building had not become a new building within the meaning of "premises" as defined in section 2 of the Control of Rent Ordinance;